144

(2)

No. 09-113

In the Supreme Court of the United States

JIM G. PRICE, PETITIONER

v.

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES TRUSTEE IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, based on petitioner's breach of professional legal ethics in the course of a bankruptcy case, the bankruptcy court had the authority to suspend him from practicing before it for three months.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 6
Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) 7, 8
Citizens Bank & Trust Co. v. *Case*, 937 F.2d 1014 (5th Cir. 1991) 8
DeMarah v. *United States*, 62 F.3d 1248 (9th Cir. 1995) 6
DeVille, In re, 361 F.3d 539 (9th Cir. 2004) 8
Huckfeldt, In re, 39 F.3d 829 (8th Cir. 1994) 8
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 7
Lopez, In re, 116 F.3d 1191 (7th Cir.), cert. denied, 522 U.S. 1014 (1997) 6
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 7
Mapother & Mapother, PSC v. *Cooper*, 103 F.3d 472 (6th Cir. 1996) 8
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 9
Pearson v. *First N.H. Mortgage Corp.*, 200 F.3d 30 (1st Cir. 1999) 8
Rimsat, Ltd., In re, 212 F.3d 1039 (7th Cir. 2000) 8

Cases—Continued: Page

Roadway Express, Inc. v. *Piper*, 447 U.S. 752 (1980) 7
Sheridan, In re, 362 F.3d 96 (1st Cir. 2004) 9
Sunshine Jr. Stores, Inc., In re, 456 F.3d 1291 (11th Cir. 2006) 8
Swegan, In re, 555 F.3d 510 (6th Cir. 2009) 6
United States v. *Corrick*, 298 U.S. 435 (1936) 6
United States v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812) ... 7
United States Trustee v. *Gryphon at the Stone Mansion, Inc.*, 166 F.3d 552 (3d Cir. 1999) 6
Weiss v. *First Citizens Bank & Trust Co.*, 111 F.3d 1159 (4th Cir.), cert. denied, 522 U.S. 950 (1997) 8

Statutes and rules:

11 U.S.C. 105(a) 8
11 U.S.C. 341 2
N.D. Cal. Civ. Local R. 11-6(a)(2) 10

Miscellaneous:

132 Cong. Rec. 28,610 (1986) 8

In the Supreme Court of the United States

No. 09-113

JIM G. PRICE, PETITIONER

v.

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES TRUSTEE IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 564 F.3d 1052. The opinion of the bankruptcy appellate panel (Pet. App. 19a-44a) is reported at 332 B.R. 404. The opinion of the bankruptcy court (Pet. App. 45a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2009. The petition for a writ of certiorari was

[1] Although the petition for a writ of certiorari does not identify the United States Trustee as a party to the case, the United States Trustee was a party in the court of appeals, see Pet. App. 1a, and is therefore a party to the proceedings in this Court under Supreme Court Rule 12.6.

filed on July 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late 2003, debtor Patricia Lehtinen retained petitioner to represent her in filing for bankruptcy. Lehtinen told petitioner that she wanted to secure a home improvement loan, perform various repairs on her house, and then sell the house to repay debts. Petitioner offered to serve as her attorney in filing the bankruptcy petition and as her real estate broker in listing her house for sale. In December 2003, with petitioner's assistance, Lehtinen filed for bankruptcy under Chapter 13. Pet. App. 47a-48a.

Pursuant to their retention agreement, petitioner agreed to attend the meeting of creditors held pursuant to 11 U.S.C. 341. On February 19, 2004, Lehtinen attended that meeting, but petitioner did not attend. Rather, petitioner sent in his stead another attorney who was not a member of his firm. Pet. App. 48a. Petitioner did not notify Lehtinen that he would be absent from the meeting, nor did he secure her consent to another attorney's appearance. *Ibid.*

In March and April 2004, petitioner advised Lehtinen to list her house for $340,000 to $345,000 in order to induce a quick sale. Pet. App. 50a-51a. Meanwhile, petitioner arranged for Lehtinen to receive a home improvement loan, but the mortgage company conditioned the loan on Lehtinen's using petitioner as her broker. *Id.* at 49a-50a. Lehtinen decided to list the house through another broker without performing any improvements, and shortly thereafter she accepted an offer for $390,000. *Id.* at 52a.

On June 3, 2004, Lehtinen attended the confirmation hearing, but petitioner again did not attend. Pet. App. 52a-53a. Petitioner was absent because he had agreed to represent another client at a hearing that afternoon in a different courthouse. *Id.* at 53a. The bankruptcy court confirmed Lehtinen's plan, but it also issued an order for petitioner to appear at a hearing on July 8, 2004, and show cause why he should not be required to disgorge any compensation received from Lehtinen for his failure to attend the creditors' meeting and confirmation hearing. *Ibid.* The next day, on June 4, 2004, petitioner sent Lehtinen a letter stating that her case had been dismissed at the confirmation hearing—a statement that was not true and that petitioner had made no attempt to verify. *Id.* at 53a-54a.

At the July 8 hearing, the bankruptcy court ordered petitioner to reduce by $300 the fee of $1500 that he had charged Lehtinen for representing her in the bankruptcy case. Pet. App. 55a. After receiving a letter from Lehtinen describing petitioner's conduct in greater detail, however, the court issued an order for petitioner to appear for a second hearing on July 26, 2004. *Ibid.* The order identified four instances of petitioner's alleged misconduct, and stated that "the facts point to a clear conflict of interest between [petitioner] acting as the debtor's lawyer, soliciting the debtor to use his services as a real estate broker, and serving as a loan broker." *Id.* at 5a (internal quotation marks and citation omitted). The order therefore required petitioner to show cause "why [he] should not be sanctioned pursuant to this court's inherent sanction power * * * for bad faith conduct" and "why he should not be suspended or disbarred from practice in this court." *Id.* at 4a (internal quotation

marks omitted). The court also ordered Lehtinen to appear and testify at the hearing. *Ibid.*

2. a. Following the July 26 hearing, the bankruptcy court determined that petitioner had violated several provisions of the California Business & Professions Code and the California Rules of Professional Conduct. Pet. App. 45a-70a; see *id.* at 69a. The court found that petitioner had intentionally failed to appear at the creditors' meeting and confirmation hearing, *id.* at 59a, 64a, and had pressured Lehtinen to hire him as her real estate broker, *id.* at 68a. The court stated that petitioner's "conduct in this case was outrageously improper, unprofessional and unethical under any reading of California's ethical standards for attorneys." *Ibid.* The court therefore ordered petitioner "to disgorge to [Lehtinen] the entire balance of the $1,500 fee he was paid in this case." *Id.* at 70a. Moreover, "[i]n light of the egregious nature of [petitioner's] conduct," the court suspended petitioner "from the practice of law in the United States Bankruptcy Court for the Northern District of California for a period of three months," with the exception of any "cases and adversary proceedings already filed in which [petitioner] has already made an appearance as the attorney of record." *Ibid.* Petitioner appealed and obtained a stay of his suspension. *Id.* at 5a.

b. The bankruptcy appellate panel held that the bankruptcy court had authority to sanction petitioner, but it vacated the portion of the bankruptcy court's order that suspended petitioner from practice, and it remanded for further proceedings to reconsider the appropriate sanction. Pet. App. 19a-44a. The panel concluded that "the bankruptcy court could discipline" petitioner, and that the court had "afforded [petitioner] due process." *Id.* at 30a. In the panel's view, petitioner "ha[d]

not shown that the bankruptcy court clearly erred in its factual findings, nor that it lacked clear and convincing evidence." *Ibid.* But while the panel determined that "discipline was appropriate," *ibid.*, it remanded the case so that the bankruptcy court could "consider the ABA Standards in determining the appropriate sanction," *id.* at 31a. See *id.* at 44a ("[T]he record does not disclose that the court considered all appropriate factors in determining what sanction to impose.").

c. The court of appeals affirmed the order of the bankruptcy appellate panel. Pet. App. 1a-18a. Although the decision under review was non-final, the court of appeals found that it possessed jurisdiction because the appeal presented a question of law, *i.e.*, whether the bankruptcy court had authority to sanction petitioner. *Id.* at 6a. On the merits, the court of appeals held that bankruptcy courts possess inherent power to sanction attorneys appearing before them for bad faith or willful misconduct. *Id.* at 8a-11a. The court further held that petitioner had received adequate notice of the possible suspension, *id.* at 12a-15a, and that the Northern District of California Civil Local Rules did not require the bankruptcy court to refer the suspension action to a standing committee, *id.* at 16a-18a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. As a threshold matter, there is a substantial question whether the court of appeals had jurisdiction to hear petitioner's appeal. The bankruptcy appellate panel vacated the decision of the bankruptcy court and remanded for that court to "consider[] all appropriate fac-

tors in determining what sanction to impose." Pet. App. 44a. Ten courts of appeals have held that "a decision by the district court on appeal remanding the bankruptcy court's decision for further proceedings in the bankruptcy court is not final, and so is not appealable * * * , unless the further proceedings contemplated are of a purely ministerial character." *In re Lopez*, 116 F.3d 1191, 1192 (7th Cir.), cert. denied, 522 U.S. 1014 (1997); see *id.* at 1192 (citing cases from eight other courts of appeals); see *In re Swegan*, 555 F.3d 510, 512 (6th Cir. 2009).

The Third and Ninth Circuits, however, have adopted a more liberal approach to appealability. See, *e.g.*, *United States Trustee* v. *Gryphon at the Stone Mansion, Inc.*, 166 F.3d 552, 556 (3d Cir. 1999). As relevant here, the Ninth Circuit has held that it possesses "jurisdiction over a non-final order in a bankruptcy case where 'the appeal concerns primarily a question of law.'" Pet. App. 6a (quoting *DeMarah* v. *United States*, 62 F.3d 1248, 1250 (9th Cir. 1995)). This Court would be required to consider that jurisdictional issue if it granted the petition, see *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), and the Court might ultimately conclude that it could not reach the merits of petitioner's claims, see *United States* v. *Corrick*, 298 U.S. 435, 440 (1936).

b. At the least, the non-final nature of the decision below counsels against further review at this time. The remand by the bankruptcy appellate panel leaves open the possibility that the bankruptcy court will not suspend petitioner once it "consider[s] all appropriate factors." Pet. App. 44a. In the event that petitioner is again suspended, he may raise his current claims—together with any other claims that might arise during

the proceedings on remand—in a new petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Accordingly, review by this Court would be premature at this time.

2. a. On the merits, petitioner argues (Pet. 3-5) that bankruptcy courts lack inherent authority to sanction the bad faith misconduct of attorneys who appear before them. That contention lacks merit. This Court's precedents have "recognized the 'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980) (citing *Link* v. *Wabash R.R.*, 370 U.S. 626, 632 (1962)). "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

"A primary aspect" of a court's inherent powers is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45. A court thus confronted with a party's bad faith misconduct in the course of proceedings has the discretion to respond with a variety of sanctions. *Id.* at 45. And just as courts can sanction parties for their bad faith conduct, so too can courts can sanction parties' counsel for the same types of misconduct. *Roadway Express*, 447 U.S. at 766 ("The power of a court over members of its bar is at least as great as its authority over litigants."). Here, the bankruptcy court imposed a sanction—suspending petitioner from accepting new cases before that court for three months—less

severe than others that have been upheld as within courts' inherent authority. *Chambers*, 501 U.S. at 45.

A clear expression of congressional intent is required to displace a court's inherent power to sanction bad faith conduct. *Chambers*, 501 U.S. at 47. The Bankruptcy Code, far from displacing the inherent powers of courts, expressly recognizes the bankruptcy court's authority to sanction litigants for abusive litigation practices. The Code states that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or *to prevent an abuse of process*." 11 U.S.C. 105(a) (emphasis added); see 132 Cong. Rec. 28,610 (1986) (statement of Sen. Hatch) (Section 105(a) "allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner.").

Accordingly, it is well established that bankruptcy courts have the power to sanction parties or counsel for bad faith conduct in bankruptcy proceedings. See, *e.g.*, *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1304-1306 (11th Cir. 2006); *In re DeVille*, 361 F.3d 539, 548-551 (9th Cir. 2004); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1046-1049 (7th Cir. 2000); *Pearson* v. *First N.H. Mortgage Corp.*, 200 F.3d 30, 42 n.7 (1st Cir. 1999); *Weiss* v. *First Citizens Bank & Trust Co.*, 111 F.3d 1159, 1171-1172 (4th Cir.), cert. denied, 522 U.S. 950 (1997); *Mapother & Mapother, PSC* v. *Cooper*, 103 F.3d 472, 477 (6th Cir. 1996); *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994); *Citizens Bank & Trust Co.* v. *Case*, 937 F.2d 1014, 1023-1024 (5th Cir. 1991). Petitioner identifies no

decision holding that bankruptcy courts lack such authority.

b. Petitioner's reliance (Pet. 3, 5-6) on *In re Sheridan*, 362 F.3d 96 (1st Cir. 2004), is misplaced. In *In re Sheridan*, the bankruptcy court did not sanction counsel in the course of an ongoing bankruptcy case. *Id.* at 107. Rather, the court presided over an omnibus disciplinary proceeding to investigate potential ethical violations that spanned many closed bankruptcy cases. *Ibid.* Absent the consent of the parties, however, a bankruptcy court may enter a final judgment only with respect to "core" proceedings, or proceedings related to the administration of a bankruptcy case. *Id.* at 99-100 (citing *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 (1982)). The First Circuit held in *In re Sheridan* that the omnibus disciplinary action involved in that case was not a core proceeding, and thus "in th[o]se particular circumstances[] the bankruptcy court was not empowered to arrive at a *final* resolution of the disciplinary matter absent further district court participation and oversight." *Id.* at 110.

Nothing in *In re Sheridan* casts doubt on the result in the present case. As the court of appeals concluded, "[t]he circumstances here are clearly different," Pet. App. 7a n.1, because the bankruptcy court sanctioned petitioner for his bad faith misconduct in the context of an ongoing bankruptcy case. The First Circuit in *In re Sheridan* "d[id] not question that the case law overwhelmingly suggests that the bankruptcy court possesses the requisite authority, either inherent or statutory, to regulate its bar as necessary and appropriate." 362 F.3d at 110. For that reason, the First Circuit made explicit that its opinion did not extend to other types of disciplinary proceedings, including proceedings con-

ducted during the course of a bankruptcy case. *Id.* at 111.[2]

c. Petitioner is also incorrect in arguing (Pet. 6-7) that the bankruptcy court acted in violation of the Northern District of California Civil Local Rules. As the court of appeals explained, see Pet. App. 17a, Civil Local Rule 11-6(a)(2) permits bankruptcy courts, *inter alia*, to "[i]mpose other appropriate sanctions" for attorney misconduct. In electing to suspend petitioner from bringing new bankruptcy cases in the Northern District for three months, rather than to initiate contempt proceedings or refer petitioner to the California Bar, the bankruptcy court imposed the sort of "other appropriate sanctions" contemplated by Civil Local Rule 11-6(a)(2). The lower courts' interpretation of their own Rules does not warrant this Court's review. And because the court of appeals affirmed the order of the bankruptcy appellate panel, which remanded the case to the bankruptcy court to reconsider the appropriate sanction, further review of the specific sanction that was previously imposed would be premature at this time. See pp. 6-7, *supra*.

---

[2] Although the court of appeals considered and rejected petitioner's contention (Pet. 5) that his disciplinary hearing was not a core proceeding, see Pet. App. 6a-7a & n.1, the bankruptcy appellate panel declined to consider that argument on the ground that "[petitioner] ha[d] waived any issue respecting the core or non-core nature of the disciplinary proceeding." *Id.* at 27a; see *id.* at 27a-28a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
WILLIAM KANTER
ROBERT D. KAMENSHINE
Attorneys

OCTOBER 2009